

No. 3012.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE KOKE COMPANY OF AMERICA, et als.,
vs. Appellants,
COCA-COLA COMPANY,
Appellee.

**Supplemental Brief for Coca-Cola Company,
Plaintiff-Appellee.**

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F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

The James H. Barry Co., San Francisco.

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SUPPLEMENTAL BRIEF FOR COCA-COLA COM-
PANY, PLAINTIFF-APPELLEE.

THIS IS A CASE OF FACT.

This case is here solely on questions of fact. The facts, after a careful and painstaking examination and an extended trial, have all been found in plaintiff's favor by the Court below in its opinion and decree (235 Fed., 408; Brief Appendix I, p. 141, and Appendix II, p. 153).

In addition, the same facts on the same record, in a separate proceeding between plaintiff, defendant Southern Koke Company, Ltd., and J. C. Mayfield, who is the alleged source of all the pretended rights of all the defendants here, to the subject matter of this controversy, have been independently found in plain-

tiff's favor, after full argument and consideration by the District Court for the Southern District of Louisiana. (Brief Appendix II, p. 156.)

The same facts, with respect to the misuse of the abbreviation Koke of plaintiff's trade-mark Coca Cola, have also been found, after full examination and consideration, in plaintiff's favor by the two tribunals of the Patent Office in a proceeding between the plaintiff and defendant Koke Company of America upon the same record before this court (only a portion, however, of its testimony was printed by the Koke Company of America). The Koke Company appealed to the Court of Appeals of the District of Columbia. This case is now finally disposed of by the action of the Court in dismissing the appeal.

Four different tribunals, therefore, upon the record here before the Court, after independent investigation, have come to the same conclusion on matters of fact.

This is a proper case for the application of the rule announced by the Supreme Court in *Adamson v. Gililand*, 242 U. S., 350, 353, and by this Court in *Central California Canneries Co. v. Dunkley Co.*, 247 Fed., 790, 794.

The attack on the validity of plaintiff's trade-mark Coca Cola involves only a question of fact, for the alleged invalidity is predicated on its asserted deceptiveness. The Court below found the trade-mark valid and overruled defendants' contentions as not estab-

lished by the evidence, a good portion of which, on defendants' behalf, was heard in open court.

This same conclusion, on the same record, was reached by the District Court in Louisiana.

The Circuit Court of Appeals of the Sixth Circuit overruled the same contentions made here and held Coca Cola to be a valid trade-mark and not deceptive in *Coca Cola Co. v. Nashville Syrup Co.*, 200 Fed., 107; 215 Fed., 942.

The validity of plaintiff's trade-mark was again sustained by the Circuit Court of Appeals of the Eighth Circuit in *Coca Cola Co. v. Bennett*, 238 Fed., 513.

Numerous Districts Courts have come to the same conclusion. (See original Brief 38 and page 13 of this brief.)

The name Coca Cola has also been registered as a trade-mark under the two Federal Trade-Mark Statutes and under their terms is *prima facie* valid.

The defendants, therefore, on these questions of fact must, it seems to us, urge something more than mere dissent.

INACCURACIES IN DEFENDANTS' BRIEF.

There are a number of inaccuracies in defendants' brief. Attention can be called specifically only to a few. On page 15 it is said:

"After plaintiff had taken all of its testimony in chief, and after defendants had begun to take

their testimony, plaintiff applied for leave to amend its bill" (Rec., 112).

The facts are shown in the record at pages 142 and 150. The amendment was prepared and served on counsel the day after plaintiff began taking evidence (July 28, 1914). Formal motion for leave to amend was made on August 17, 1914, and granted on February 17, 1915. (Rec., 153.) The statement that plaintiff asked leave to amend because it "was surprised by the testimony of its own witnesses" (Brief, 18) and repeated on page 19, is an utterly gratuitous assumption not borne out by the facts. There is a significant absence of any reference to any page of the record as supporting either this assertion or the further statement that "witnesses' written statements were read into the record verbatim as testimony." There would be no objection to such practice, even if the statement were true. (*Samuel v. Hostetter*, 118 Fed., 257, 259.) Granting plaintiff leave to amend is assigned as error by defendants.

The allowance of such an amendment is a matter of course under Equity Rules 19 and 28, and being the discretionary act of the Court below, is not reviewable on appeal.

Slicer v. Bank of Pittsburg, 16 How., 571, 578;

Kennon v. Gilmer, 131 U. S., 22;

McFaul v. Ramsey, 20 How. (61 U. S.), 523;

Kerr v. Clampitt, 95 U. S., 188;

Railway Co. v. Heck, 102 U. S., 120;
Roemer v. Bernheim, 132 U. S., 103;
Fitzgerald v. Fitzgerald, 137 U. S., 98;
Milwaukee & Minnesota R. R. Co. v. Soutter,
 154 U. S., 540;
Credits Commutation Co. v. United States, 177
 U. S., 311;
Williams v. Cable, 219 Fed., 663;
 4 *Corpus Juris*, 796-799;
Moore v. Thompson, 138 Cal., 23; 70 Pac.,
 930;
Scholle v. Finnell, 167 Cal., 90; 138 Pac., 746,
 751.

On page 44 the statement, concerning Judge Foster's disposition of the case against the defendant, Southern Koke Co. Ltd., at New Orleans, is erroneous. The inference sought to be conveyed is that Judge Foster entered merely a *pro forma* order. The case was set for trial on the motion of defendants' counsel and was vigorously argued, fully briefed, and decided independently by the Court on its merits. There was no understanding that the decree against defendants there was to remain interlocutory pending the decision of this Court. The case now stands awaiting an accounting of damages from the defendants. The decree is printed as Appendix III to original brief (p. 156).

On page 44, a quotation of a single paragraph from the Commissioner of Patents' opinion is given, which, without the context, is misleading. The whole opin-

ion is printed in Appendix V to the original brief (p. 180), where, what the Commissioner did find, appears.

Coca Cola Company v. Henry A. Rucker was a suit brought by plaintiff about 1902 to recover payments of taxes under the Spanish War Revenue Act of 1898, which were levied on the claim that Coca Cola was a patent medicine. It was held (117 Fed., 1006; 56 C. C. A., 248, and 125 Fed., 1004) that Coca Cola was not so taxable.

A printed transcript of the record in this case was offered in evidence by defendants at the trial below (Rec., 2501). It was objected to and the objection was sustained by the Court (Rec., 2501). No error is assigned to this action of the District Court, as required by Rule 11, and it is not mentioned in the specifications of error in the brief, as required by Rule 24-2-b. (*Doe v. Waterloo Mining Co.*, 70 Fed., 455; *Connell v. Diederichsen*, 213 Fed., 737, 740.)

The copious quotations in defendants' brief from what counsel calls the "Rucker record" are, therefore, somewhat surprising and are manifestly improper.

Extended quotations from the "Rucker record" are printed on the following pages of defendants' brief: 118, 120, 125, 144, 152, 154, 155, 156, 157, 158, 159, 160, 161, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 187, 197, 198, 199, 200, 201, 206, 224, 226, 227.

Other extended quotations, which are not found in

the record in this case, appear on pages 113, 114, 115, 116, 118, 119, 120, 121, 122, 123, 124, 126, 127, 128, 129, 133, 134, 136, 137, 146, 147, 169, 170, 171, 184, 204, 256, 257. These are alleged quotations from scientific books and dictionaries not in evidence. The purported quotations from testimony of Kent and Closter, 138, 139, 140, 201, and Robinson, 173, are from a Patent Office Interference disposed of twenty-five years ago. The testimony was not given in this case. The quotations from the testimony of Fuller, on pages 183, 210 (last paragraph), and on pages 211, 225, 226, 229, 230, 231, 245, 249, 250, are from his testimony in *U. S. v. 40 Bbls. & 20 Kegs of Coca Cola*.

The purported quotation from Asa G. Candler, p. 187, is from the testimony of John D. Fletcher, and is a quotation not from testimony given here, but from an affidavit in *Coca Cola Co. v. Nashville Syrup Co.*

In all, about fifty-five pages of defendants' brief are thus made up. The contention, which will be discussed later, that plaintiff does not come into court with clean hands, seems to be based largely on this matter which is outside the record in this case.

No record pages are cited as authority for the statements under the caption, "The Rule Applied," on page 46, and following of defendants' brief. Possibly the Rucker record or some other extraneous document purports to be their source. There certainly is nothing in the record in this case which could serve as a basis for these assertions.

RES JUDICATA.

With respect to the misuse of the abbreviation Koke of plaintiff's trade-mark Coca-Cola in a proceeding brought by this plaintiff against the defendant Koke Company of America in the Patent Office under Section 6 of the Act of February 20, 1905, on the same testimony here before the court (but not all printed by the defendant) and raising the same issue, the Examiner of Interferences held for plaintiff, refused the registration applied for by the Koke Company, holding that it had no right either to register or use the word Koke because it was an unlawful attempt to appropriate a nick-name long used by the public to designate Coca-Cola. This decision was affirmed by the Commissioner of Patents and on January 5, 1918, the appeal, taken by the Koke Company to the Court of Appeals of the District of Columbia, was dismissed on the Court's motion for non-compliance with the rules relating to printing. These decisions are printed as appendices IV and V to the original brief for the plaintiff. The decision thereupon became final and the controversy, as far as it concerns the word Koke, was concluded.

All the elements of *Res Judicata* exist.

The parties are the same, the controversy is the same, the facts are the same. This matter was duly called to the Court's attention in a petition filed by

appellee on May 7, 1918, following the practice sanctioned by the Supreme Court in

The Hart Steel Co. v. The Railroad Supply Co., 244 U. S., 294.

As was said by Mr. Justice Harlan in *Southern Pacific R. R. v. United States*, 168 U. S., 1, 48:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked, for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

"Among the cases in this court that illustrate the general rule are *Hopkins v. Lee*, 6 Wheat., 109, 113; *Smith v. Kernochen*, 7 How., 198, 216; *Thompson v. Roberts*, 24 How., 233, 240; *Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles*, 24 How., 333, 340, 341, 343; *Rus-*

sell v. Place, 94 U. S., 606, 608; *Cromwell v. Sac County*, 94 U. S., 351; *Campbell v. Rankin*, 99 U. S., 261; *Lumber Co. v. Buchtel*, 101 U. S., 638; *Bissell v. Spring Valley Township*, 124 U. S., 225, 230; and *Johnson Co. v. Wharton*, 152 U. S., 252."

It is a well-established rule that a decree by a court of competent jurisdiction concludes the parties and their privies in a subsequent suit as to all questions of law or fact which were necessarily litigated and determined.

Cromwell v. County of Sac, 94 U. S., 351;
Johnson Co. v. Wharton, 152 U. S., 252, 258;
D'Arcy v. Staples & Hanford Co., 161 Fed.,
 733.

These rules apply in trade-mark and unfair competition cases. (38 Cyc., 907.)

The demands and subject-matter in this case, in so far as concerns the abbreviation Koke of plaintiff's trade name Coca-Cola, are identical with those in the Patent Office proceedings. As was said by Mr. Justice Story in *Lawrence v. Vernon*, 3 Sumn., 20; Fed. Cas., 8146, and cited with approval in *Empire Nail Co. v. American Solid Leather Button Co.*, 71 Fed., 588, the test is "whether the same evidence will support both actions."

And in these cases by stipulation and order the evidence is in fact the same.

The principle here contended for as to the finality of the decision of the Patent Office is in accord not

only with the well-established doctrine with regard to the findings of the Interstate Commerce Commission, but also with regard to the findings of other administrative officers of the Government.

Maxwell Land Grant Case, 121 U. S., 325.

The acts and decisions of administrative officers in the discretion delegated by Congress have been held to be conclusive. In *Butterfield v. Stranhan*, 192 U. S., 470, the decision of the Secretary of the Treasury as to the standard of teas to be imported was held to be not subject to judicial review. In the bridge cases, *Union Bridge Co. v. U. S.*, 204 U. S., 364; *Monongahela Bridge Co. v. U. S.*, 216 U. S., 177; *Hannibal Bridge Co. v. U. S.*, 221 U. S., 194, it was held that the decision of the Secretary of War as to the reasonableness or unreasonableness of the obstruction of navigation was conclusive on the courts in the absence of proof that the Secretary had acted in an arbitrary or unreasonable manner.

THE DEFENSE OF UNCLEAN HANDS.

Defendants in the brief filed in their behalf seem studiously to avoid reference to the facts in this case, but spend the first two hundred and ninety-one pages in a labored discussion of asserted unclean hands on the part of complainant, accompanied with copious quotations from certain old advertisements, not issued

since about 1902,¹ and what is called the Rucker record—not the record in this case. The relevancy of either is not apparent. The so-called Rucker record purports to be a transcript of testimony taken in a revenue case sixteen years ago, offered in the court below, excluded and no error assigned. (Rec. 2501). The advertisements, innocent in themselves, were discontinued over fifteen years ago. Defendants' infringement complained of in this case began in 1909.

COCA-COLA IS A VALID TRADE-MARK AND NOT DECEPTIVE
AND THE PRODUCT IS A HARMLESS DRINK.

The name "Coca-Cola" is then asserted by defendants to be a misdescription of plaintiff's product. The short answer to this is that Coca-Cola is an arbitrary name and is not a description at all. It is a registered trade mark under the Federal Law, uncanceled and unattacked. It has repeatedly been held a valid trade-mark by the courts.

¹ The defense of unclean hands cannot be predicated upon statements discontinued prior to suit.

Moxie Co. vs. Modox, 153 Fed. 487, 489; 162 Fed. 649.

Johnson & Johnson v. Seabury, 61 Atl. 5; 69 N. J. Eq. 696; 67 Atl. 36; 71 N. J. Eq. 750.

Symonds v. Jones, 82 Me. 202; 19 Atl. 820, 823.

Siegert v. Gandolfi, 149 Fed. 100.

Peoria Gas & Electric Co. vs. Peoria, 200 U. S. 48.

Employing Printers Club v. Dr. Blosser Co., 122 Ga. 509; 50 S. E. 353; 69 L. R. A. 90.

Clark Thread Co. v. Armitage, 67 Fed. 896, 899.

Pillsbury v. Pillsbury, 64 Fed. 841, 850.

Broder v. Zeno Mauvais Music Co., 88 Fed. 74, 79.

Beecham v. Jacobs, 159 Fed. 129, 131; 221 U. S. 263.

Keeley v. Hargreaves, 236 Ill. 316; 86 N. E. 132.

- Coca-Cola Co. v. Nashville Syrup Co.*, 200 Fed., 107; 215 Fed., 942;
Coca-Cola Co. v. Bennett, 238 Fed., 513;
Coca-Cola Co. v. Butler, 229 Fed., 224;
Coca-Cola Co. v. Duberstein, U. S. D. C., Southern District Ohio, March 19, 1918 (not yet reported);
Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720; 211 Fed., 942;
Coca-Cola Co. v. American Druggists Syndicate, 200 Fed., 107;
Coca-Cola Co. v. Deacon Brown Bottling Co., 200 Fed., 105;
Coca-Cola Co. v. Virginia Syrup Co., 3 Trade Mark Reporter, 125.

Counsel's discussion of the alleged unclean hands by reason of the asserted fact that the word Coca-Cola is deceptive is nothing but a tedious repetition of what has been urged in other cases involving this mark and invariably dismissed as of no consequence.

- Coca-Cola Co. v. Nashville Syrup Co.*, 200 Fed., 153; 215 Fed. 527;
Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720; 211 Fed., 942.

The difficulty with the unclean hands defense is that what it is sought to be based upon is not true as a matter of fact, and was so found from the evidence by the Court below (Rec., 239).

It is intimated that there is cocaine in Coca-Cola. This is not true. Coca-Cola does not contain any cocaine. Charles E. Caspari (Rec., 902), John A. Wesener (Rec., 923). In the proceedings brought by the Government under the Food Act, *U. S. v. 40 Barrels and 20 Kegs of Coca-Cola* (241 U. S., 265), it was not even asserted that Coca-Cola had any cocaine in it.

It is then insinuated that the name "Coca-Cola" is misleading. It is not deceptive, because Coca-Cola does in fact contain extracts derived from coca leaves and cola nuts. This is shown by the testimony not only of chemists, who detected these substances on analysis (H. B. Fuller, Rec., 2360, 2361, 2369), but the testimony of chemists and others who have actually seen the substances extracted from the cola nut and the coca leaves put in the product in the course of manufacture. Charles E. Caspari (Rec., 905), John A. Wesener (Rec., 924), C. H. Candler (Rec., 444).

It is then asserted that even if present, these extracts do not have any effect on the product, but this contention is completely negated by the proofs. Dr. Fuller says (Rec., 2319): "The flavor of 'Coca-Cola' syrup is not the flavor of any one thing. It is a very peculiar blend in which no one thing sticks out more than anything else."

Dr. Caspari says (Rec., 914): "That is what you have in Coca-Cola. You have a blend of various ingredients, and no single one predominates."

Dr. Wesener, speaking of the extractives (Rec., 929, 930): "It gives character to the drink which without it, it would not have." And Dr. Fuller says (Rec., 2368-9): "It would unquestionably act as a blend and the blend would produce the very pleasant flavor that Coca-Cola has."

Coca-Cola is not a medicine, it is a harmless soda fountain beverage. People drink it because they like its taste. This taste is distinctive and is a blend of many flavors, all contributing to the whole.

Among the ingredients in Coca-Cola are extractives from the cola nut and the coca leaf. The syrup with these extracts has a taste different from a syrup made without them. (Caspari, Rec., 915; Wesener, Rec., 929, 930).

Opposing counsel complain that these extractives are small in quantity. As stated above, this product is not sold as a medicine (*Coca-Cola Co. v. Rucker*, 125 Fed., 1004), but as a beverage, an acidulated and flavored syrup, like all syrups, composed largely of sugar, containing among other things essential oils, extractives from cola nuts and coca leaves mixed with carbonated water to make a soda fountain drink. There is a small amount of caffeine in Coca-Cola, less than in tea or coffee. It is not injurious to health (Rec., 924). There is no testimony the other way. We do not understand that there is any dispute on this point.

Taste is a subtle thing. Physiologists and psycholo-

gists know little about it. Taste is a thing which cannot be disputed. It is not a matter to be determined by a quantitative analysis. Perfumes, odors, sauces, flavors, like mixtures of tobacco and blends of liquors, are all complex combinations of many ingredients. Any variation may completely alter the result. Coca-Cola has, among other ingredients, extractives from cola nuts and cola leaves in it. These extractives, whatever their quantity, contribute to the distinctive flavor which Coca-Cola has and which the public likes. The name is truthful in its suggestion, if it can be said to carry any.

THE INCONSISTENCY OF THE DEFENSES.

In this case the defendants have been driven from one defense to another. The defense first was that Koke and Dope were defendants' lawful trade marks and that their use was earlier than as nicknames for Coca-Cola. This contention was clearly fabricated and when this little journey into fiction was exposed and condemned, of course other defenses had to be found or defeat acknowledged, so they were forthcoming. Then it was urged that the words Koke and Dope, which previously defendants claimed to own exclusively, were the common property of everyone. This is still advanced, but is subordinated to the defense of unclean hands. Having unsuccessfully experimented with fictitious anticipation and the common to the trade defense, defendants seize upon

the doctrine of unclean hands as an afterthought, attempt to sustain it in part by purported extracts from the so-called Rucker record which was excluded below, and by multiplying language consume 291 pages in the citation of perfectly sound, but utterly inapplicable, cases.

We have in this case the edifying spectacle of a pirate attacking the merit of the very product he imitates and attempting to blacken by cries of unclean the identical good will he is using his best endeavors to steal.

This Court effectually disposed of such a contention in *Samuels v. Hostetter*, 118 Fed., 257, where Judge Gilbert said (260):

"The argument that it is a quack medicine, and that it is injurious to the human system, and is contraindicated for some of the ailments which it purports to cure, comes with ill grace from those who imitate it as closely as they may without possessing a complete knowledge of its formula, and by unfair trade sell the simulated articles as and for the genuine."

COCA-COLA IS NOT MISBRANDED.

Much is said in defendants' brief (p. 235) as to the effect of the decision in *United States v. Forty Barrels and Twenty Kegs of Coca-Cola*, 191 Fed., 431; 241 U. S., 265, and it is insisted that the decision of the Supreme Court is conclusive against the validity of the registered trade mark Coca-Cola and establishes

the fact of adulteration and misbranding of Coca-Cola so as to prevent protection of that term as a trade mark or against the assaults of unfair competition. The lower court (191 Fed., 431) held that caffeine was an element always present in Coca-Cola and hence was not an added ingredient within the meaning of the Food and Drugs Act (191 Fed., 436). The lower court did not pass upon or permit the jury to pass upon the questions as to whether the name Coca-Cola suggested and represented the presence of coca or whether there was cola or whether caffeine was a deleterious or poisonous ingredient. The Supreme Court disagreed with the lower court and held that caffeine was an added ingredient, but did not pass or attempt to pass upon the question whether it was a poisonous or deleterious ingredient, which rendered the article injurious to health, but held that as there was a decided conflict of competent testimony on the latter question, it was a question of fact for the jury (241 U. S., 285). The Court did not decide whether there was present in Coca-Cola derivatives of coca and cola, but said there was conflicting evidence on that point (285).

In passing upon the question of what is a distinctive name under the Food and Drugs Act, it was held that coca and cola were not distinctive within the meaning of that Act. The Court did not pass or attempt to pass upon the question of whether Coca-Cola was or was not a valid trade mark and did not decide that the

name Coca-Cola could not be registered as a trade mark under the ten year clause of the Federal Trade Mark Act. Certainly the Food and Drugs Act did not attempt to repeal and cannot be construed as repealing the Federal Trade Mark Registration Act of February 20, 1905, or the prior registration acts.

After the decision of the Supreme Court in *United States v. Coca-Cola Co.*, 241 U. S., 265, the litigation was settled by agreement of parties and a decree entered, which expressly provides that it shall not be applicable or adversely employed in any other litigation in which the Coca-Cola Co. is interested. A certified copy of this decree is annexed to the petition of the Coca-Cola Company filed by leave of this court on May 7, 1918. That this was proper for the protection of the plaintiff's trade mark rights in Coca-Cola is clear from the decisions in *United States v. American Tobacco Co.*, 164 Fed., 700; 221 U. S., 106, 153; 191 Fed., 371, 418, 420, 423, 425, etc., where trade marks and brands acquired for the purpose of or during an unlawful monopoly were recognized and protected as property.

The contention that Coca-Cola is adulterated (Br., p. 290) needs no consideration. It is simply a variation of the asserted unclean hands. Advertisements discontinued many years before the filing of this bill are cited. This assertion is predicated on the same false premise, viz., that there is no cola in Coca-Cola. Then it is asserted that since all the

cocaine is taken out of the coca leaves which are used in Coca-Cola, that a valuable ingredient is abstracted and hence, the conclusion is drawn that Coca-Cola is adulterated under Section 7 of the Food and Drugs Act. This, like much that precedes it, is based on counsel's unwillingness or inability to perceive that the name Coca-Cola is a trade mark for a soda fountain drink, not the description of a medicine. The name Coca-Cola means nothing except the particular product sold by the plaintiff. By constant use and association, it means *that thing*. It identifies a specific article of wide sale and popularity.

It is familiar doctrine that where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or remedy can be only that which the statute prescribes. There is neither a statute nor any principle of common law which would make misbranding or adulteration or even a clear, conclusive and final adjudication between the United States and the Coca-Cola Co. of technical misbranding an obstacle to the protection of established trade and property rights in the word Coca-Cola.

Ford Motor Co. v. Boone, 244 Fed., 335;

Burnhisel v. Firman, 22 Wall., 170;

Barnet v. National Bank, 98 U. S., 555, 559;

Oates v. National Bank, 100 U. S., 239, 250;

Stephens v. Monongahela Bank, 111 U. S., 197;

Walker & Co. v. Globe Newspaper Co., 130 Fed., 594; 140 Fed., 305; 210 U. S. 356, 362;
Galveston Ry. Co. v. Wallace, 223 U. S., 481, 490;
Wilder Mfg. Co. v. Corn Products Co., 236 U. S., 165;
Coca-Cola Co. v. Bennett, 238 Fed., 513, 518;
Mich. Central R. R. Co. v. Vreeland, 227 U. S., 59, 67;
St. Louis, Iron Mountain & So. Ry. Co. v. Craft, 237 U. S., 648, 655.

The adjudication, if there was any, in *United States v. Coca-Cola Co.*, 241 U. S., 265, is entirely collateral and inapplicable to the present proceedings.

Northwestern Milling Co. v. Callam & Sons, 177 Fed., 786, 788;
Independent Baking Powder Co. v. Boorman, 130 Fed., 726, 728;
Weyman-Bruton Co. v. Old Indian Snuff Mills, 197 Fed., 1015;
LaFayette Bridge Co. v. City of Streator, 105 Fed., 729, 731;
General Elec. Co. v. Wise, 119 Fed., 922, 924;
National Distilling Co. v. Cream City Importing Co., 86 Wis., 352; 56 N. W., 864;
Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720, 724;
Coca-Cola Co. v. Bennett, 238 Fed., 513.

As to the inapplicability of the doctrine of unclean hands see:

Siebert v. Gandolfi, 149 Fed., 100, 103;
Dr. Peter Fahrney & Sons Co. v. Ruminer, 153
 Fed., 735, 737;
Wells & Richardson Co. v. Abraham, 146 Fed.,
 190, 197;
Rectanus Co. v. United Drug Co., 226 Fed.,
 545, 548.

THE ALLEGED VIOLATION OF THE TRUST LAWS IS NOT
 ESTABLISHED AND IS IRRELEVANT.

The charge in the amended answer, and urged in the argument, concerning what counsel call, with much elocution, "plaintiff's vicious unfair competition" against the Koke Companies and the alleged oppression of dealers in Koke, is probably not intended to be taken seriously. The contracts referred to at the argument where it was charged that plaintiff constrained dealers to agree not to handle any product which would be used as a substitute for Coca-Cola, are all predicated on the fact, proved in each case and confessed in the contract itself by the dealer, that he had been guilty of passing off a substitute as and for Coca-Cola.

In addition to Van Winkle, the Secretary of the

Koke Company of Texas,¹ a considerable number of other witnesses were called and examined on this subject. They were also cross-examined and many were forced to admit that Koke is a well recognized abbreviation of the name Coca-Cola. For example, Culbreath (Rec., 1703-4) states it as a matter of common knowledge that in Texas, Koke is a common nickname for Coca-Cola. Substitution of Koke for Coca-Cola and suggestions of passing off by defendants' salesmen and "the public will not know the difference," also were admitted.

It is evident that the Coca-Cola Company's efforts to stop the dishonest assaults on its business by the practices of fraudulent traders is not only legitimate but praiseworthy. It is denied, however, that its actions, in this respect, are a defense to this suit.

These, like the defense attempted to be predicated on the alleged violation of the Harrison anti-narcotic law, the Food and Drugs Act, the Sherman and Clayton Acts, are not sustained by the evidence but, if established, are irrelevant under all the authorities. (*Ford Motor Co. v. Boone*, 244 Fed., 335.)

The alleged violation of the Anti-Trust Acts was raised against The Coca-Cola Company and held,

¹ Attention is invited to Defendant's Exhibit 214 produced by this witness, where John Schaap & Sons wrote the defendant Koke Company of Texas about a visit of a Coca-Cola salesman to a dealer who evidently had been passing off Koke on calls for Coca-Cola. This dealer stated that he was going to resume handling Koke. "I told him," says the correspondent, "that he must not sell it as Coca-Cola but as Koke. He was confident that he could do this."

even if established, not to be a defense in *Coca-Cola Co. v. Bennett*, 238 Fed., 513, in *Coca-Cola Co. v. Butler*, 229 Fed., 224, and *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720, 724, following the rule laid down by Judge Morrow in *Insurance Co. v. Clunie*, 88 Fed., 160, 170.

To the same effect are:

Wilder v. Corn Products Co., 236 U. S., 165;
Insurance Oil Tank Co. v. Scott, 33 La. Ann.,
 946;
Milling Co. v. Callam, 177 Fed., 786;
Baking Powder Co. v. Boorman, 130 Fed., 726;
*Weyman-Bruton Co. v. Old Indian Snuff
 Mills*, 197 Fed., 1015;
Brown Saddle Co. v. Troxel, 98 Fed., 620;
Bonnie v. Bonnie, 169 S. W., 871.

PLAINTIFF'S REGISTRATION IS VALID AND DEFENDANTS INFRINGE.

It was contended at the oral argument and is suggested in defendants' brief that the Coca-Cola Company's registration of the trade mark Coca-Cola, under the ten-year proviso of the Act of February 20, 1905, is invalid because of the alleged use of certain other marks for similar products during the ten-year period. The marks, alleged to have been used, either infringe plaintiff's trade mark or they do not. If they do not, the contention is irrelevant. There is no pretense that anyone but the Coca-Cola Company has used the

name Coca-Cola during the ten-year period and plaintiff's registered trade mark consists of the name Coca-Cola. If the names alleged to have been used infringe Coca-Cola, this case is governed by *Thaddeus Davids Co. v. Davids*, 233 U. S., 461. Here Mr. Justice Hughes observed:

"We need not stop to discuss the contention that the complainant's use had not been exclusive or that the mark had not been used in interstate commerce, or the further defense that the complainant should be denied relief because it had deceived the public. It is enough to say that these contentions were without adequate support in the evidence and were properly overruled by the Circuit Court."

The decree of the Circuit Court of Appeals was reversed and that of the Circuit Court affirmed.

The facts, on which the contention was based that the plaintiff had not the exclusive use of the mark during the period, are to be found in a note to Judge Hough's opinion (190 Fed., 285), printed in 1 T. M. Rep., 215-219:

"Three defenses are urged that will merely be noted:

"1st. It is said that complainant has long so misled the public in respect of its products that its trade mark is not deserving of protection within such cases as *Worden v. California Fig Syrup Co.*, 187 U. S., 282. The trade mark is the single word 'Davids.' How that single word can convey or be used to convey any false impression to the public is difficult to see; but entirely apart from this, I

am of opinion that the complaints made by the defendants are without merit if they are not frivolous, viz., that 'Electro-chemical Writing Fluid' is not prepared by any electrical process; that 'Oriental Carmine Ink' does not come from the Orient, and is not based on extract of cochineal, and that 'Silk Filtered Ink' is no longer silk filtered, although it once was.

"2nd. The registration of complainant's trade mark is said to be invalid because complainant and its predecessors had not had exclusive use thereof for the statutory period. The only evidence to support this contention is that an impostor named Davis sold 'Davis' Inks' to people who thought they were buying Davids' ink. The exclusive use of a trade mark means rightfully exclusive use, and is not disturbed by an unsuccessful effort to steal the same, nor even by furtive and partial success in making some profit out of the attempted theft."

It is then reasserted (Brief, 291) that the name Coca-Cola is not a trade mark. Counsel in this respect disregard two acts of Congress under which Coca-Cola is registered as a trade mark, the registrations not attacked and sustained in this very proceeding in the Patent Office, and three decisions of Circuit Courts of Appeal (*Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720; *Coca-Cola Co. v. Nashville Syrup Co.*, 215 Fed., 527; *Coca-Cola Co. v. Bennett*, 238 Fed., 513), and the decisions of any number of district courts which have sustained the name Coca-Cola as a trade mark. The name Coca-Cola was, when it was first adopted, an entirely new compound word, but under the Act of

Congress of February 20, 1905, under which it is registered, it is of no consequence if it were descriptive, since under that Act descriptive words exclusively used for ten years prior to its passage, when registered are entitled to the same protection as other trade marks. (*Dauids v. Dauids*, 233 U. S., 461, 466; *Rossman v. Garnier*, 211 Fed., 403; *Manitou Co. v. Schueler*, 239 Fed., 593, 602; *Stark v. Stark*, 248 Fed., 154, 156).

The next twenty pages of defendants' brief are consumed in the purely academic discussion whether or no the words Koke and Dope infringe plaintiff's trade mark Coca-Cola. It is perfectly plain that Koke is a natural and inevitable abbreviation of the longer name, but this record shows as a fact that the words Koke and Dope are common nicknames used by the public for Coca-Cola, that they are fraudulently used by defendants with the intention of passing off defendants' spurious product as and for Coca-Cola and that the use of these nicknames by defendants actually results in passing off and deception. It makes no difference whether the variety of fraud which this record discloses is the kind technically known as trade mark infringement or some other kind. Whatever the variety, it is fraud and all that plaintiff asks is to be protected against fraud.

To assert that Koke is not a mere abbreviation of Coca-Cola is flying in the face of the obvious. It is the first three letters of the word Coca-Cola—C-o-c. This, of course, is pronounced Coke. Defendants' mark

is spelled K-o-k-e, but its pronunciation is precisely the same as the familiar contraction of plaintiff's trade mark. That Koke is merely a contraction of the word Coca-Cola is a necessary and obvious conclusion, even without evidence to this effect; but the testimony in this case shows as a matter of fact that Koke is used by the public as an abbreviation of Coca-Cola and is so found as a fact by the court below. So, there is no necessity of basing the conclusion in this respect, even on an obvious fact. As far as the word Koke is concerned, defendants have plainly appropriated an essential part of plaintiff's trade mark, which has resulted in deception.

Saxlehner v. Eisner & Mendelson Co., 179 U. S., 19, 33. Mr. Justice Brown said:

"It is not necessary to constitute an infringement that every word of a trade mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article. It was said by Vice Chancellor Shadwell, in 1857, that if a thing contained twenty-five parts, and one only was taken, such imitation would be sufficient to contribute to a deception, and the law would hold those responsible who had contributed to the fraud. *Guinness v. Ullmer*, 10 Law Times, 127. While this may be a somewhat exaggerated statement, the reports are full of cases where bills have been sustained for the infringement of one of several words of a trade mark. *Shrimpton v. Laight*, 18 Beav., 164; *Clement v. Maddick*, 1 Giff., 98; *Hostetter v. Vonwinkle*, 1 Dill., 329; *Morse v. Worrell*, 9 Am. Law Review, 368; *Grillon v. Guenin*, Weekly Notes (1877), 14;

American Grocer Pub. Association v. Grocer Pub. Co., 25 Hun., 398."

The word Dope is not so obviously an abbreviation of Coca-Cola as is the word Koke but the evidence in this case shows and the court below found as a fact that it is as unmistakably a short name or nickname for Coca-Cola as is Koke.

It is then asserted that the words Koke and Dope are purely descriptive, Koke meaning cocaine or any narcotic drug, and Dope, because synonymous with Koke, having the same descriptive force. Defendants' good faith in assuming this position is questionable when it is recalled that both the words Koke and Dope are claimed by defendants as trade marks for their product and proper registration of them in the Patent Office is asserted, not under the ten-year clause of the present statute, but as technical trade marks and hence as arbitrary words. But it is evident that, as applied to Coca-Cola, both of these terms are fanciful and non-descriptive and are as fortuitous as nicknames applied to people.

It does not matter in the present case whether the terms Koke and Dope are descriptive in a general sense, or at the prescription counter, or race track, for the evidence overwhelmingly shows that at soda fountains, or places where soft drinks are sold, these two terms have been and are systematically and generally applied by the public to designate Coca-Cola, and

nothing else and that defendants adopted these names with knowledge of this fact.

A reference to Schedule II to plaintiff's brief is a demonstration that the words Koke and Dope are short names used by the public in ordering and identifying Coca-Cola. 'This is shown not only by the testimony adduced by the plaintiff (Schedule II, p. 24) but by the admissions of defendants' witnesses. (Schedule II, p. 53). It is found as a fact by Judges Sawtelle and Foster and with respect to Koke, by the Examiner of Interferences in the Patent Office and by the Commissioner of Patents. The contention that the words Koke and Dope are terms of description applicable not alone to Coca-Cola but also to its imitations, is a complete reversal of the trade position assumed by defendants where the claim is made that these words are defendants' exclusive trade marks and is an uncandid afterthought induced by the exigencies of this case.

In view of the fact that there are two subsisting registrations of the word Coca-Cola, which are not attacked, and that it has been repeatedly sustained as a valid trade mark, the quotations from *Delaware & Hudson Canal Co. v. Clark*, 80 U. S., 311, 328, and *Trinidad Asphalt Co. v. Standard Paint Co.*, 163 Fed., 977; 220 U. S., 446 (Br. 324, 325) are without application or force.

The appalling array of quotations from American and English authorities (Defendants' Brief, 326, 391)

where courts have refused to protect descriptive, generic or personal names, may be discriminated and laid aside without detailed criticism or review. In each case there was an utter failure to prove any registration which would give technical trade mark rights as in the present case, and also a complete failure to prove a generally acquired secondary or designative meaning of the term, and in every case an absolute failure to prove any fraud on the part of defendant in adoption and use. Here the record demonstrates (1) Registration of Coca-Cola as a technical trade mark; (2) Secondary meaning in the retail trade and by purchasers for consumption, of the terms Koke and Dope, both being abbreviated, slang terms for Coca-Cola, and the understanding both by the retail seller and the purchaser for consumption that each term designates plaintiff's product. It must also be recalled that Coca-Cola is the only advertised soft drink of its kind and that in all places where it is sold Coca-Cola signs are displayed, so that the purchaser has them plainly in view. He asks for Koke or Dope with the Coca-Cola sign staring him in the face, and takes Coca-Cola without objection. That he has Coca-Cola in mind, is shown not only by the surrounding circumstances and the purchaser's acquiescence in receiving Coca-Cola when Koke or Dope is asked for, but also by the undisputed evidence of plaintiff's investigation of soda fountains (Schedule II, p. 84). (4) But this case has a peculiar element not found in any other case either

of technical trade mark or secondary meaning. It was the purchasing public and consumers that applied the terms Koke and Dope to plaintiff's product. This is not a case, so far as these two terms are concerned, of adoption, use and extensive advertising of either term by the Coca-Cola Company. The public itself selected the terms and applied them as designating Coca-Cola. This is a demonstration both of their trade mark and secondary meaning use, for the two are not incompatible. (5) This case presents a demonstrated fraud on the part of defendants in their selection and use of the terms Koke and Dope. Plaintiff's product was designated by these two terms long before defendant or any of its pretended predecessors selected the terms as a means of passing off another product which, in localities where Coca-Cola is called Koke is sold by defendants under the name Koke and the same product, in places where Coca-Cola is called Dope, is sold by defendants under that name. This fraud is shown by the testimony of the Mayfields, of Murphey, of Wright and Moore, of the various retail dispensers of defendants' product, by the imitation by defendants of plaintiff's bottles, labels, barrels and the color, taste and general appearance of its product, the imitation of the color and script form in writing Koke and Dope, and also most emphatically by the use of both terms Koke and Dope as names for one and the same product put out by defendants. Therefore, whether the terms be treated as arbitrary and fanciful, or as descrip-

tive with an acquired secondary meaning, the result is the same. Defendants, at the instigation of Mayfield, have deliberately and intentionally adopted, as names of their merchandise the two terms, which they knew are indicative of Coca-Cola, and under which they knew the purchasing public asks for and identifies Coca-Cola. So that we have in this case an actual fraudulent purpose in the adoption of the names complained of and actual fraudulent representation of defendants' officers and salesmen, suggesting to dealers that defendants' product be sold at added profit as and for Coca-Cola, and that it has in fact been sold as and for Coca-Cola. That is to say, in this case there is no need of indulging in any inferences as to what defendants intended, or in any speculation concerning the deceptive results of defendants' acts. Both are conclusively proved, and indeed are admitted. The purpose was fraud and the result deception. This in itself distinguishes the present controversy from the cases cited by defendants in their brief.

It is not necessary, in order that a term may have either a technical trade mark or secondary meaning significance, that the public use it with the name of the manufacturer of the desired article distinctly in mind. It is enough that it be employed for the purpose of identifying a well-known and approved product, which the would-be purchaser has in mind

as a result of extensive advertising, approved quality, or previous use.

Powell v. The Birmingham Vinegar Brewery Co., 14 R. P. C., 720, is applicable in this case upon two questions. Here it was said by Lord Herschell in delivering his opinion in the House of Lords (p. 730):

“I think that the fallacy of the appellants’ argument rests on this; that it is assumed that one trader cannot be passing off his goods as the manufacturer of another unless it be shown that the persons purchasing the goods know of the manufacturer by name, and have in their mind when they purchase the goods that they are made by a particular individual. It seems to me that one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, though they do not know that other by name at all. In the present case, it seems to me that ‘Yorkshire Relish’ means the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it means a particular manufacture; and that when a person sold ‘Yorkshire Relish,’ as the appellants did, by selling it as ‘Yorkshire Relish,’ and calling it ‘Yorkshire Relish,’ they represented to the public that it was that manufacture which was known as and by the name of ‘Yorkshire Relish.’”

And again by Lord Davey (p. 731):

“The appellants’ contention is, if I understand it rightly, that the respondent has no monopoly of the manufacture, and that all the world may manufacture these goods if they can, and if they can succeed in manufacturing these goods, they are entitled

to call them by the only name by which these goods can be described. Now, my Lords, I do not find it necessary to say much or anything as to the legal validity of the appellants' argument as I have described it; but it fails in fact. The appellants do not pretend that they have discovered the respondent's secret, or that the goods are made according to the same recipe. All they say is that they are substantially identical with the respondent's, or a 'wonderful match.' Other words are used indicating a close similarity between the two sauces; but it is not pretended that the appellants' sauce is made of the same compounds or made in the same way, although it is said that it produces much the same result. The appellants, therefore, are misrepresenting the character of their goods when they call them 'Yorkshire Relish.' They are not, in fact, 'Yorkshire Relish,' though I will assume they closely resemble that compound."

The doctrine of *Powell v. The Birmingham Vinegar Brewery Co.*, 14 R. P. C., 720, has been recently affirmed and applied in *Publishing Co. et al. v. Merriam Co.*, 238 Fed., 1, where it was said by Judge Denison:

"It is not of controlling importance to the true application of the secondary meaning theory that the public should appreciate the personal identity of the manufacturer. The deception involved in every such case, as in a trade mark case, is said to be a deception as to the origin of the goods; but this is a formula for expressing the ultimate result. With reference to articles which have trade names, it is the article itself and its good qualities which the public appreciate and which cause it to desire to get the genuine article made by the manufac-

turer who has established its reputation, rather than something made by some one else. Particularly under present day conditions, the purchasing public may have a fixed purpose to buy a given article and not a substitute therefor, and yet be quite ignorant whether the genuine article is made by one or another manufacturer. Even under earlier conditions, the purchaser of 'Stone Ale' or 'Camels' Hair Belting' or 'Glenfield Starch' very likely knew as little as he cared about the personal identity of the maker."

As already shown, however, these two terms Koke and Dope are not descriptive or generic terms, but, as applied to Coca-Cola, are purely arbitrary, and are the choice of the public and consumers as indicating Coca-Cola by abbreviated substitute terms. It cannot be important why the public may have given these nicknames to Coca-Cola. The fact is that the public has done so and defendants are knowingly and unfairly taking advantage of this fact.

After having elaborated the argument against the acquisition of secondary meaning during the period of sole manufacture, counsel proceeds to upset the asserted fact on which this argument is based by enumerating a number of terms alleged to be applied to various products imitating Coca-Cola (Defendants' Brief, p. 423), and add that there are hundreds of others. This is utterly inconsistent with the asserted fact upon which the argument of non-acquisition of secondary meaning because of alleged sole manufacture is based.

Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co., 235 Fed., 657, is paraded with great gusto, probably because some of the present counsel for the Coca-Cola Company were counsel for the defendant, Quaker Oats Company, in that case. In that litigation plaintiff sought to establish a secondary meaning for the term "toasted corn flakes." It was shown (1) that this phrase was absolutely and completely descriptive of both plaintiff's and defendant's products, and that both were made of corn, flaked and toasted; (2) that plaintiff utterly failed to show any secondary meaning designative of its product by the phrase "toasted corn flakes," but on the contrary plaintiff's own evidence showed conclusively that the term "toasted corn flakes" was used in a descriptive sense purely to indicate only the *kind* of product, while the different manufacturers of the article were shown by added identifying names or in other ways, the difference in packages, plaintiff's product being known as "Kellogg's Toasted Corn Flakes" and defendant's as "Quaker Toasted Corn Flakes"; (3) that there was no fraud even charged against the defendant and the finding of both of the courts exonerated defendant from any suspicion of fraud, deceit or deception; (4) and that defendant had so plainly and unmistakably differentiated its package and markings from the package and markings of plaintiff, that all of plaintiff's witnesses declared they could and did readily differentiate between the two not only by the words "Kel-

logg's" and "Quaker," but by the differences in the packages which could be seen even across a retail store.

As to the arguments on the "get-up" of goods and "get-up" of packages (Defendant's Brief, pp. 432, 465) and the cases there cited, it is plain that the arguments and the decisions are good enough law when they have any application, but they are irrelevant in the present instance. The product Coca-Cola has been protected in many courts not only in name, nicknames, labels, crowns and barrels, but in the color of the product itself.

Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720;
Coca-Cola Co. v. Nashville Syrup Co., 200
 Fed., 157; 215 Fed., 527;

*Coca-Cola Co. v. American Druggists Syndi-
 cate*, 200 Fed., 107;

Coca-Cola Co. v. Koke Co., 235 Fed., 408;

Coca-Cola Co. v. Butler, 229 Fed., 224;

Coca-Cola Co. v. Bennett, 238 Fed., 513.

However, all the cases cited on this point by counsel, including *U. S. Tobacco Co. v. McGreenery*, 144 Fed., 531; 144 Fed., 1022, which went to defendant because the resemblances between packages were common to the trade, are not pertinent because, even if it were conceded that the color, taste, appearance of Coca-Cola and the bottles in which it is put up and sold are common to the trade, it is admitted that the

form, color and appearance of label, and the color and type of the lettering thereon are peculiar to Coca-Cola and distinctive and designative of it, and the evidence shows and the court below found that defendants deliberately and purposely closely imitated every element of this kind, including the color and script with the flourish of Coca-Cola, the form, size and color of the label and the facsimile signature thereon. It is not true, as counsel keep asserting, that the use of the duplicated labels was discontinued. Specimens were taken from a wagon and purchased in the market long after the institution of this suit and showed that the imitative labels and crowns were in actual use at that time. (Rec., 849; Exhibits 154, 160.)

The references to the cases of *Coca-Cola Co. v. Branham*, 216 Fed., 264, and *Coca-Cola Co. v. Glee-Nol Bottling Co.*, 221 Fed., 61, are without force.

In *Coca-Cola Co. v. Branham*, the suit was against the bottler of syrup, which he sold as Koke. The record was entirely different from the present one and as, found by the Court, no fraud was shown. There was no suggestion of substitution or actual substitution as in the present case. The Court expressly found:

“There is no proof that defendants sold ‘Koke’ for ‘Coca-Cola’ or advised their customers to do so.”

The Court therefore differentiated the case from *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720.

It was also said:

"If the use of the name (Koke) had been observed by defendants, and it was afterwards adopted by them with the purpose and intention of taking advantage of that fact, and to engage in the manufacture and sale of a beverage and call it 'Koke' and sell it 'as and for "Coca-Cola",' then a case of unfair competition would undoubtedly be made out."

These are exactly the facts shown by the present record and it is evident that if the Court had had the record in this case before it in the Branham case, the ruling would certainly have been in favor of plaintiff.

The dictum that the misuse of nicknames is not enjoicable is directly overruled by the later decision of the Circuit Court of Appeals of the Eighth Circuit, in which the Branham case was decided, in *Denver Chemical Mfg. Co. v. Lilley*, 216 Fed., 870, where Judge Carland said:

"There are no disputed questions of law. It being conceded, as it must be, that while appellant adopted the name 'Antiphlogistine' for its product, still if for some reason the general public has given to the product another and different name, by which it alone is known to the trade, the appellant becomes entitled to protection by injunction against one who thereafter endeavors through the adoption of such term as the public employs as synonymous for or as a secondary designation of such

product, for in so doing the purchasing public may be deceived as to the article purchased, and the appellant is deprived of that trade which its industry and money have built up. The question to be decided is entirely one of fact. The questions of fact are: Had the name 'Denver Mud,' prior to the use thereof by the Germicide Company, come to indicate and designate in the public mind the appellant's medicament alone? Is the Germicide Company, by the use of the label above described, endeavoring to pass off to the public its plastic compound as that of the appellant?

"The intention of the Germicide Company must be found from what it does."

In *Coca-Cola Co. v. Glee-Nol Bottling Co.* (*supra*), it was found that the name of the defendant's drink was not at all like that of the plaintiff, that the one drink was not like the other either in taste or color, that there was no evidence at all having a tendency to prove that the defendant in any way undertook to mislead the dealers or induce them to substitute Glee-Nol for Coca-Cola when the latter was called for and no evidence from which it could be inferred that anything defendant did amounted to an imitation of any distinguishing feature of the plaintiff's product, or was intended to, or in fact did beguile the public or any part of it, into buying Glee-Nol under the impression that they were buying Coca-Cola and therefore a case of unfair competition was not made out, the Court concluding by saying:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufac-

turer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant the action fails. *Howe Scale Co. v. Wyckoff*, 198 U. S., 14; *Coca-Cola Co. v. Branham*, 216 Fed., 264."

These two cases are therefore unlike the present one in the facts, for here Koke and Dope are shown to mean Coca-Cola, and imitation of bottles, barrels, labels, colors and names, an actual fraudulent purpose on the part of defendants, deliberate intention of passing off by the adoption of names, the suggestion of passing off and actual fraudulent passing off are proved.

CONCLUSION.

Without being overnice in the choice of words, defendants' scheme as demonstrated by this record is a cheap and common swindle, attempted to be justified at the outset by the fabrication of testimony, to establish a fictitious claim of prior use.

The scheme of fraud devised and carried out by these defendants must be effective and profitable or it would not be so persistently litigated. That it is a deliberately dishonest enterprise cannot be doubted. Defendants' intentional fraud, and the repeated suggestions of passing off are not only demonstrated by the testimony, but are not even denied. The salesmen who counseled dealers to pass off defendants' imitation for Coca-Cola and "no one could tell the difference" though in defendants' employ were not called

as witnesses. Fraud, deceit and deception are admitted. Two courts on the record now before this Court have found sweepingly for the plaintiff, and two tribunals of the Patent Office have independently come to the same conclusion. J. C. Mayfield, an officer of all the defendants here, their alleged predecessor in trade and the prime mover in the schemes, has been branded a fraudulent trader and by two courts and the Patent Office as unworthy of belief under oath.

It is urged that this Court put an effectual stop to the scheme of superlatively unfair trading which this record discloses by affirming the decree appealed from.

Respectfully submitted.

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